

APPEAL NO. 230225  
FILED APRIL 6, 2023

This appeal arises pursuant to the Texas Workers' Compensation Act, Tex. Lab. Code Ann. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on December 20, 2022, with the record closing on December 28, 2022, in (city), Texas, with (administrative law judge). presiding as the administrative law judge (ALJ). The ALJ resolved the disputed issues by deciding that: (1) the compensable injury of (date of injury), does not extend to Complex Regional Pain Syndrome (CRPS) of the right lower extremity (LE); (2) the compensable injury of (date of injury), extends to moderately decreased sensation of the right foot sural and superficial peroneal nerves; (3) the appellant (claimant) reached maximum medical improvement (MMI) on January 26, 2022; and (4) the claimant's impairment rating (IR) is nine percent. The claimant appealed that portion of the ALJ's extent-of-injury determination that was against him, as well as the ALJ's determinations of MMI and IR. The respondent (carrier) responded to the claimant's appeal, urging affirmance of the ALJ's determinations.

The ALJ's determination that the compensable injury of (date of injury), extends to moderately decreased sensation of the right foot sural and superficial peroneal nerves was not appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated, in part, that: on (date of injury), the claimant sustained a compensable injury in the form of at least the carrier-accepted conditions of right foot strain/sprain, fracture of the third and fourth metatarsals of the right foot, and crush injury to the right foot; and the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed (Dr. K) as designated doctor on the issues of MMI, IR, and extent of injury. The claimant, who worked on Bobcat machines, was injured on (date of injury), while checking for a leak in the hydraulic system of a Bobcat when it unexpectedly moved, knocked him down, and rolled onto his right foot. He was not able to free himself for approximately 20 minutes when a coworker noticed him and moved the Bobcat off his foot.

The ALJ is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence. *Texas Employers Insurance Association v. Campos*, 666 S.W.2d 286 (Tex. App.—Houston [14th Dist.] 1984, no writ). As an appellate reviewing tribunal, the Appeals Panel will not disturb challenged factual findings of an ALJ absent legal error, unless they are so against the great weight and preponderance of the evidence as to be

clearly wrong or manifestly unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986); *In re King's Estate*, 150 Tex. 662, 244 S.W.2d 660 (1951).

### **EXTENT OF INJURY**

The ALJ's determination that the compensable injury of (date of injury), does not extend to CRPS of the right LE is supported by sufficient evidence and is affirmed.

### **MMI**

The ALJ's determination that the claimant reached MMI on January 26, 2022, is supported by sufficient evidence and is affirmed.

### **IR**

Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight, and the Division shall base the IR on that report unless the preponderance of the other medical evidence is to the contrary, and that, if the preponderance of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Division, the Division shall adopt the IR of one of the other doctors. 28 Tex. Admin. Code § 130.1(c)(3) (Rule 130.1(c)(3)) provides, in part, that the assignment of an IR for the current compensable injury shall be based on the injured employee's condition as of the MMI date considering the medical record and the certifying examination.

The ALJ determined that the claimant reached MMI on January 26, 2022, with a nine percent IR in accordance with the certification of Dr. K, the designated doctor. Dr. K initially examined the claimant on April 4, 2022, and certified that the claimant reached MMI on January 26, 2022, with a five percent IR based on the conditions of right foot sprain/strain and fractures of the third and fourth metatarsal bones. As this certification does not rate the compensable conditions of crush injury to the right foot or moderately decreased sensation of the right foot sural and superficial peroneal nerves, it cannot be adopted.

Following a Presiding Officer's Directive to Order Designated Doctor Exam dated August 30, 2022, Dr. K next examined the claimant for MMI and IR on September 26, 2022, and issued alternate certifications, all with an MMI date of January 26, 2022. Based on the carrier-accepted conditions of right foot strain/sprain, fracture of the third and fourth metatarsals of the right foot, and crush injury to the right foot plus the compensable conditions of moderately decreased sensation of the right foot sural and superficial peroneal nerves, Dr. K assigned a nine percent IR. Using the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing,

including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides), Dr. K assessed zero percent impairment based on range of motion (ROM) measurements of the right lesser third and fourth toes and five percent impairment based on ROM deficits in the right ankle. Dr. K additionally assigned two percent impairment for moderately decreased sensation of the sural nerve and another two percent impairment for moderately decreased sensation of the superficial peroneal nerve. Dr. K then combined the five percent impairment for the right ankle, the two percent impairment for the sural nerve, and the two percent impairment for the superficial peroneal nerve for a whole person impairment of nine percent based on Table 68 on page 3/89 of the AMA Guides. The AMA Guides provide on page 3/88 that all estimates listed in Table 68 are for complete motor or sensory loss for the named peripheral nerves. In this case, Dr. K stated that the sensory deficits were “moderately decreased” and did not document a complete sensory loss. The specific provisions of the AMA Guides do not prohibit using Table 11 on page 3/48 of the AMA Guides to rate the value of a partial sensory deficit using Table 68.

See *generally* Appeals Panel Decision (APD) 122502, decided January 30, 2013, and APD 150024, decided February 4, 2015. As Dr. K did not properly rate the sensory loss for the sural and superficial peroneal nerves, his certification cannot be adopted. The ALJ’s determination that the claimant’s IR is nine percent is reversed.

Dr. K also issued two alternate certifications with an MMI date of January 26, 2022, and they both assigned a five percent IR. The first certification considered and rated the conditions of right foot sprain/strain and fractures of the third and fourth metatarsal bones. The second certification considered the right foot sprain/strain, fractures of the third and fourth metatarsal bones, and CRPS, which we have affirmed is not part of the compensable injury. As these certifications do not consider and rate the compensable injury, they cannot be adopted.

(Dr. P), a treating doctor referral, examined the claimant on May 20, 2022, and certified that the claimant reached MMI on January 26, 2022, with a five percent IR. Dr. P considered and rated right foot sprain/strain and fractures of the third and fourth metatarsal bones. As this certification did not consider or rate the compensable conditions of crush injury to the right foot or moderately decreased sensation of the right foot sural and superficial peroneal nerves, it cannot be adopted. Dr. P also opined that if CRPS is considered the claimant is not at MMI; however, as we have affirmed the claimant reached MMI on January 26, 2022, and that CRPS is not compensable, this opinion cannot be adopted. Dr. P examined the claimant again on August 25, 2022, and again issued alternate certifications that the claimant reached MMI on January 26, 2022, with a five percent IR based on the conditions of right foot sprain/strain and fractures of the third and fourth metatarsal bones, and that the claimant had not reached

MMI when considering CRPS. These certifications cannot be adopted for the same reasons Dr. P's prior certifications could not be adopted.

There are no other certifications of MMI and IR in evidence. As there is no IR that can be adopted, we remand the issue of IR to the ALJ for further action consistent with this decision.

### **SUMMARY**

We affirm the ALJ's determination that the compensable injury of (date of injury), does not extend to CRPS of the right LE.

We affirm the ALJ's determination that the claimant reached MMI on January 26, 2022.

We reverse the ALJ's determination that the claimant's IR is nine percent, and we remand the issue of IR to the ALJ for further action consistent with this decision.

### **REMAND INSTRUCTIONS**

Dr. K is the designated doctor in this case. The ALJ is to determine whether Dr. K is still qualified and available to serve as designated doctor. If Dr. K is no longer qualified or available, then another designated doctor is to be appointed.

The ALJ is to request that the designated doctor give an opinion on the claimant's IR, as of the MMI date of January 26, 2022, and rate the entire compensable injury, which is right foot strain/sprain, fracture of the third and fourth metatarsals of the right foot, crush injury to the right foot, and moderately decreased sensation of the right foot sural and superficial peroneal nerves in accordance with the AMA Guides considering the medical record and the certifying examination. The ALJ is to inform the designated doctor that the compensable injury of (date of injury), does not extend to CRPS of the right LE. The ALJ is also to inform the designated doctor that the AMA Guides provide on page 3/88 that all estimates listed in Table 68 are for complete motor or sensory loss for the named peripheral nerve and not for partial sensory loss. Additionally, the specific provisions of the AMA Guides do not prohibit using Table 11 to rate the value of a partial sensory deficit using Table 68.

The parties are to be provided with the designated doctor's new MMI/IR certification and are to be allowed an opportunity to respond. The ALJ is then to make a determination on MMI and IR consistent with this decision.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision

and order by the ALJ, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Division, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See APD 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **ZURICH AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY  
211 EAST 7TH STREET, SUITE 620  
AUSTIN, TEXAS 78701-3218.**

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Cristina Beceiro  
Appeals Judge

CONCUR:

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Carisa Space-Beam  
Appeals Judge

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Margaret L. Turner  
Appeals Judge